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**DEFENSE MOTION TO
MODIFY CHARGES – LACK
OF SUBJECT-MATTER
JURISDICTION – OFFENSES
MUST BE COMMITTED
DURING INTERNATIONAL
ARMED CONFLICT**

The defense in the case of the *United States v. David M. Hicks* moves to modify all charges against Mr. Hicks so that they exclude all conduct prior to 7 October 2001, and states in support of this motion:

1. **Synopsis:** The military commission lacks jurisdiction to try Mr. Hicks for any law of war violation prior to 7 October 2001 because the law of war is not applicable to conduct committed prior to the existence of armed conflict – in this instance, the United States and Afghanistan.
2. **Facts:** The United States armed forces commenced military action within the borders of Afghanistan on 7 October 2001.
3. **Discussion:** Military commissions have jurisdiction to hear cases involving violations of the law of war, which becomes operable only during armed conflict, and which governs only that conduct committed during the period of such armed conflict. The law of war “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached”¹ Thus, the initiation of an armed conflict marks the earliest point at which conduct may fall within the jurisdiction of a military commission.

The armed conflict between the United States and Afghanistan began on 7 October 2001, when United States military aircraft participated in air strikes within the boundaries of Afghanistan. Because this armed conflict involved two states, it constitutes an international armed conflict, to which the law of war became applicable as of that date: 7 October 2001.²

In that context, the charges against Mr. Hicks are invalid because they encompass the following time frames, which include substantial periods to which the law of war does not apply:

¹ ICTY, Appeals Chamber, *Prosecutor v. Tadic*, 35 I.L.M. 32, 54 (1996).

² See Common Article 2 to the Geneva Conventions: *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, Geneva Conventions). Available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

Charge 1: 1 January 2001 to December 2001;

Charge 2: 11 September 2001 to 1 December 2001; and

Charge 3: 1 January 2001 to 1 December 2001.

As detailed above, the law of war did not apply prior to 7 October 2001, which marks the inception of the armed international conflict between the U.S. and Afghanistan. As a result, none of the events alleged in the charges that occurred prior to 7 October 2001, can be considered by this commission as violations of the law of war, or evidence of any such subsequent alleged violation. Indeed, conduct prior to 7 October 2001, must be stricken from the charges, and barred from the commission's consideration of any remaining allegations.

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

5. Evidence:

A: The testimony of expert witnesses.


B: Attachments

1. *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, Article 2.

6. **Relief Requested:** The defense requests that the charges be modified by replacing the inception date in Charges 1 to 3 with 7 October 2001.

7. The defense requests oral argument on this motion.

By:


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fulltext



**Convention (I) for the Amelioration of the Condition of the Wounded and Sick in
Armed Forces in the Field. Geneva, 12 August 1949.**

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Armies in the Field of July 27, 1929, have agreed as follows:

Chapter I. General Provisions

Art 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

Attachment 1 to RE _____